IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
2013-5093

CMS CONTRACT MANAGEMENT SERVICES,
THE HOUSING AUTHORITY OF THE CITY OF BREMERTON,
NATIONAL HOUSING COMPLIANCE,
ASSISTED HOUSING SERVICES CORP.,
NORTH TAMPA HOUSING DEVELOPMENT CORP.,
CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC.,
SOUTHWEST HOUSING COMPLIANCE CORPORATION,
and NAVIGATE AFFORDABLE HOUSING PARTNERS
(formerly known as Jefferson County Assisted Housing Corporation),

Plaintiffs-Appellants,

v.

MASSACHUSETTS HOUSING FINANCE AGENCY,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in consolidated case Nos. 12-CV-0852, 12-CV-0853, 12-CV-0862, 12-CV-0864, and 12-CV-0869, Judge Thomas C. Wheeler.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Table of Acronyms

ACC-	Annual Contributions Contract
APA-	Administrative Procedure Act
CFDA-	Catalogue of Federal Domestic Assistance
CICA-	Competition in Contracting Act
COFC-	Court of Federal Claims
FAR-	Federal Acquisition Regulation
FGCAA-	Federal Grant and Cooperative Agreement Act
GAO-	Government Accountability Office
HAP-	Housing Assistance Payment
HFA-	Housing Finance Agency
HUD-	U.S. Department of Housing and Urban Development
NOFA-	Notice of Funding Availability
PBACC-	Performance-Based Annual Contributions Contract
PBCA-	Performance Based Contract Administrator
PBRA-	Project-Based Rental Assistance
PHA-	Public Housing Agency
RFP-	Request for Proposals

Appellants respectfully file this Reply, which demonstrates that the COFC erred: (i) by failing to rule that the PBACCs are procurement contracts; and (ii) because, even if they are not procurement contracts, the trial court erroneously failed to assess whether the PBACCs' anti-competitive provisions violate the APA.

I. ARGUMENT

A. The COFC Has Jurisdiction to Consider the NOFA's Anti-Competitive Restrictions, Regardless of the PBACCs' Principal Purpose

Before GAO and the COFC, HUD ducked the substantive issue of the NOFA's anti-competitive restrictions, instead arguing that neither GAO nor the COFC have jurisdiction to review this question. HUD's appeal strategy is no different.

GAO held and Appellants maintain that the PBACCs are procurement contracts under the FGCAA. If the PBACCs constitute procurement contracts, HUD admits that the NOFA violates procurement laws. JA300/AR1151. However, even assuming the COFC were correct that the PBACCs are cooperative agreements under the FGCAA, the Tucker Act required the COFC to review the NOFA under the APA.

As HUD concedes, the COFC determined it had jurisdiction over the NOFA beyond addressing the threshold FGCAA question. Gov't Br. ("GB") 52; *see*

JA0017-18. HUD also concedes that the COFC did not review the NOFA under the APA. GB 54-55. Instead, HUD argues that the COFC lacked jurisdiction to adjudicate the NOFA's anticompetitive aspects once that court ruled that the PBACCs were cooperative agreements. GB52. HUD also argues that, even if the COFC had jurisdiction, it was not required to address the APA issue because it was "not central" to Appellants' case. GB55n.19. HUD is wrong.

1. The COFC Has Jurisdiction to Conduct APA Review of the NOFA Under the Tucker Act

HUD contends that "after [the COFC] correctly determined that HUD's implementation of the 1937 Housing Act by using cooperative agreements was compliant with the FGCAA, the trial court should have dismissed the case for lack of jurisdiction." GB53. Thus, HUD argues that the COFC should have ruled that it was without jurisdiction to consider whether HUD erred by failing to assess if the NOFA was improperly anti-competitive under the APA. GB52-53. HUD, which completely ignores the one case addressing this issue and on which Appellants relied in their Opening Brief, is mistaken.

In their Opening Brief Appellants relied on *360Training.com v. U.S.*, 104 Fed. Cl. 575, 585-88 (2012), for the proposition that even if "the COFC's conclusion that the PBACCs are cooperative agreements" is "correct," "it did not obviate the Tucker Act's requirement to examine the NOFA's anticompetitive

restrictions under the APA" because the COFC retained jurisdiction over that issue. Appellants' Opening Br. ("AOB") 59. While HUD repeatedly referenced *360Training.com* for other reasons, *see* GB33, 34, 37, 38, and the COFC relied on it for this very issue, JA00018, HUD completely ignores it as to this jurisdictional issue. Significantly, it is the only case that directly considers the interaction of the FGCAA, the Tucker Act and 41 U.S.C. §111 as they pertain to the definitions of "procurement" and "procurement contract."

HUD had good reason for ignoring *360Training.com.* In pertinent part, that case provides:

> [**The FGCAA] is mostly irrelevant to this Court's jurisdiction under §1491(b)(1)**. … [**T]he FGCAA is directed to a different set of concerns than the Tucker Act**. The FGCAA sets criteria that an agency should evaluate when deciding which legal instrument best represents the relationship between two parties, while the Tucker Act provides for jurisdiction over a procurement or a proposed procurement…. The Court, therefore, finds that **the descriptions of procurement contracts and cooperative agreements contained in 31 U.S.C. §6303 and §6305 [i.e., the FGCAA] do not narrow the definition of procurement in the Tucker Act or 41 U.S.C. §111**.
>
> The Government essentially is arguing that, if an agreement can properly be called a cooperative agreement under §6305, then that agreement cannot be "in connection with" a procurement or proposed procurement [under §1491(b)(1)]. **The Court rejects this argument because the definition of "procurement" under the Tucker Act is broader than the definition of "procurement contract" in the FGCAA**. [Emphasis added; internal citation omitted.]

104 Fed. Cl. at 587-88; *see also Interpretation of Federal Grant & Cooperative Agreement Act of 1977*, B-196872-O.M., March 12, 1980, 1980 U.S. Comp. Gen. LEXIS 3894, at *14-*15 ("specific transaction must be reviewed and properly classified since some aspects of carrying out an assistance program remain primarily procurement in nature"). Consequently, the COFC, which relied on *360Training.com* for this point, JA0018, correctly determined it had jurisdiction.

2. The NOFA's Anti-Competitive Restrictions, Which Constitute the Key Substantive Issue Here, Are Improper Regardless of Whether the PBACCs Are Procurement Contracts or Cooperative Agreements

HUD concedes that the COFC decision is silent as to the application of the APA. GB54-55. In arguing that the COFC was not required to devote any attention to this issue, HUD incorrectly asserts that the NOFA's anti-competitive restrictions were "not central to the appellants' case." GB55n.19. In fact, HUD's unlawful exclusion of Appellants from the NOFA competition is **THE** central issue here. The threshold FGCAA question – whether the PBACCs are procurement contracts or cooperative agreements – merely sets the ground rules under which this central question is reviewed.

It is beyond dispute that, through the NOFA's anti-competitive restrictions, HUD is eliminating competition for the in-state HFAs bidding on the NOFA. HUD admits that if an in-state HFA submits a minimally responsive proposal,

HUD will not consider any other proposal, even of more qualified, more experienced, better value offerors, such as Appellants. JA300/AR0082. Why HUD would do this, and artificially re-brand the PBACC contracts as cooperative agreements, is apparent from the two-year history of HUD's first effort to re-compete the PBACCs.

Currently, HFAs perform 37 of the 53 PBACC contracts – 11 of these were awarded in the 2011 competition; the remaining 26 are hold-over contracts from HUD's first nationwide PBACC competition that commenced in 1999. JA300/2000. Prior to the PBACC re-competition in 2011, HUD faced severe criticism for its repeated extension of the original PBACCs and its failure to re-compete them. For example, on November 12, 2009, HUD's Inspector General ("IG") issued a scathing report that found enormous waste under the PBCA initiative. JA300/AR0460-95. The IG found the largest PBCAs' profits ranged from 39-67% and, in one case, was 198%. JA300/AR0468. According to the IG, HUD "did not protect resources from waste," noting that one state diverted PBACC funds to "purchase apartments and 'leisure-time condominiums'" and others used PBACC funds to repay millions of dollars for misuse of other HUD-restricted funds. JA300/AR0469-70. In the report, HUD committed to a "market driven" re-competition of the PBACCs, which encouraged PHAs to cross state lines and perform in multiple jurisdictions. JA300/AR0490(cmt.12).

Four days after the report issued, NCSHA, the HFAs' lobbying and trade association, objected to re-competition and requested that HUD simply extend the existing contracts. HUD declined, noting that re-competing contracts would insure the Government "is getting the best value." JA300/AR0676. HUD reminded NCSHA that "[t]he major reason for the establishment of the [PBCA] program was to increase the effectiveness and efficiency of HUD's oversight of its Section 8 Project Based Rental Assistance Program." *Id.*

The 2011 PBACC competition generated the expected results, saving taxpayers $100 million a year, but was disastrous for the incumbent HFAs, many of whom filed GAO protests,[1] asserting at least implicitly that the PBACCs were procurement contracts. *See, e.g.*, JA6122, 6128-40; AOB17-20. HUD moved to dismiss, contending for the first time that the PBACCs were cooperative agreements and hence beyond GAO's jurisdiction. JA300/AR2843-45. Before GAO could rule on HUD's motion, HUD mooted the protests by cancelling all 42 challenged contracts. *Id.*

Realizing they could not compete, the HFAs devised a strategy to exclude their competitors, including Appellants. Several HFAs convinced their legal counsel -- their in-state Attorneys General -- to sign letters opining on issues

[1] Of the 24 protesters in 2011, the majority (14) were HFAs. JA6322.

relating to qualifications entities must present to be a housing authority under their respective states' law. AOB58. The HFAs then asserted to HUD that these letters did not allow HUD to contract with out-of-state entities or even local in-state PHAs. AOB21-22, 55-61.

Without explanation, HUD capitulated to the HFAs' demands and adopted anti-competitive restrictions in the NOFA despite acknowledging that nothing in Federal law supported such restrictions. JA300/AR0082. The effect was to exclude the very parties HUD determined in 2011 represented the best value to HUD and which, in many cases, were long-time, successfully-performing incumbent PBACC contractors. *Id.*

While HUD willingly acted on the petitions of the HFAs and their advocates, it ignored Appellants' views. AOB21-22. For example, in December 2011, Navigate learned that the Kentucky HFA had solicited a letter from its AG – who, in addition to being the HFA's legal counsel, is an *ex officio* member of its Board of Directors -- purporting to bar out-of-state PHAs from competing in Kentucky. JA6307. Navigate provided a rebuttal to HUD, including a letter from Navigate's Kentucky counsel, thoroughly debunking the AG letter. JA300/AR6304-11. In February 2012 and again in April 2012, Navigate, through counsel, raised additional concerns about the restrictions on out-of-state PHAs. JA6289-6311. HUD refused to respond and nothing in the record shows that HUD

considered any of Navigate's submissions. Navigate also raised questions through the NOFA Question and Answer process about the basis for the anti-competitive restrictions. JA300/AR1011-14. Again, HUD ignored these questions in violation of HUD's NOFA procedures. JA300/AR1011-71.

Appellants specifically protested the anti-competitive restrictions in their May 2012 GAO protests. JA300/AR0419-22, 0518, 0699, 0714. HUD did not respond other than to concede that, if the PBACCs were procurement contracts, the NOFA did not comply with procurement law. JA300/AR1151. HUD also declined to provide any documents on this issue and the record is devoid of any discussion of the NOFA restrictions' basis. *Id.*

After prevailing before GAO, Appellants asserted at the COFC that regardless of whether the NOFA represented a procurement contract or a cooperative agreement, the restrictions were unlawful. *See, e.g.*, JA6000-6003. Appellants devoted nearly 30 pages of briefing to this issue. *Id.;* JA5748-51, 6386-89, 6432-38, 6463-64. Rather than respond in substance, HUD argued (as it does here) that the COFC lacked jurisdiction. JA5682-86. Our Opening Brief summarizes some of the specific deficiencies surrounding the anti-competitive restrictions. AOB55-62.

While Plaintiff-Appellee, MassHousing, an HFA,[2] has explained why it believes the anti-competitive restrictions might be appropriate, *see* MassHousing Brief ("MHB") 12-20, HUD has declined to address the issue. JA300/AR1151; AR2852n.21. As the COFC acknowledged, HUD's record is not sufficiently developed to allow meaningful examination of HUD's basis for the NOFA's anti-competitive restrictions. AOB56 n.11; *see* JA0307, 0277-78. HUD further violated the APA by failing to document a proper and reasoned basis for the restriction. *See AshBritt, Inc. v. U.S.*, 87 Fed. Cl. 344, 370 (2009); *Caddell Constr. Co. v. U.S.*, 111 Fed. Cl. 49, 110-12 (2013)(citing *Impresa Construzioni Geom. Domenico Garufi v. U.S.*, 238 F.3d 1324, 1333, 1337-38 (Fed. Cir. 2001)).

HUD portrays this appeal as merely about an abstract application of the FGCAA's requirements. In fact, it is fundamentally about the NOFA's unlawful,

[2] MassHousing and HUD divert attention from the central APA issue by focusing on the current "encourage competition" language in 31 U.S.C. §6301. GB12; MHB7. However, even if they are right about this language (which they are not), they still lose on the underlying APA issue. *See* AOB60-62. While they argue that this language is meaningless, they ignore the FGCAA's history. As enacted, "[t]he purposes of [the FGCAA] are … to … encourage competition, **where deemed appropriate**, in the award of grants and cooperative agreements." Pub.L.No. 95-224, §2(b)(3), 92 Stat. 3 (Feb. 3, 1978) (emphasis added). The highlighted language was deleted in 1982 and §6301(3) now states "encourage competition in making grants and cooperative agreements." Pub.L.No. 97-258, 96 Stat. 1003 (Sept. 13, 1982). This change demonstrates that Congress intended that agencies "encourage competition" whenever a cooperative agreement is made and not simply "where deemed appropriate."

anti-competitive restrictions. HUD's re-branding of the PBACCs as cooperative agreements is simply a tactic to avoid accountability on this key question.

As GAO's Redbook states:

> It is important that an agency identify the appropriate funding instrument because procurement contracts are subject to a variety of statutory and regulatory requirements that generally do not apply to assistance transactions [e.g., cooperative agreements]. If the type of relationship is not determined properly, assistance arrangements could be used to evade competition and other legal requirements applicable to procurement contracts.

GAO, Principles of Federal Appropriations Law, vol. II, at 10-18 (2006)("Redbook"). HUD's mischief is precisely what the FGCAA was enacted to prevent. *Id.*; 31 U.S.C. §6301.

B. The COFC and HUD Do Not Address the FGCAA's Fundamental Requirements

The FGCAA requires an examination of the ***instrument*** in question, the PBACC contract. AOB32-35. If "the principal purpose of the instrument" is for the Government "to acquire … property or services for" its own "direct benefit or use," a procurement contract is required. 31 U.S.C. §6303. That the analysis must focus on the ***instrument*** in question is clear from the FGCAA's plain language. 31 U.S.C. §6301 (FGCAA "prescribe[s] criteria for executive agencies in selecting appropriate legal instruments"); 31 U.S.C. §6303 (requiring assessment of "the principal purpose of the instrument").

The Government has inherent authority to enter procurement contracts but must have specific statutory authority to enter into an assistance agreement. Redbook, vol. II, at 6-88, 10-17. Even where such specific authority exists, "the specific transaction must be reviewed and properly classified since some aspects of carrying out an assistance program remain primarily procurement in nature." *Interpretation of Federal Grant & Cooperative Agreement Act of 1977*, 1980 U.S. Comp. Gen. LEXIS 3894, at *14-*15.

Consistent with the FGCAA, our Opening Brief demonstrated that the PBACCs, including their terms, are fundamentally fee-for-service contracts, where the PHA provides a service to HUD and HUD pays it a fee as consideration. *See* AOB10-15, 35-41. We also discussed the extensive record showing "the principal purpose" of the PBACCs was to alleviate the burden on HUD's staff, to help HUD improve its oversight and management of the program, and not to provide a "thing of value" to the PHAs. AOB35-41. GAO undertook a similarly thorough analysis of the instrument and the record describing its purpose. JA2843-45. Both Appellants' analysis and GAO's decision gave particular attention to the context of the Housing Act. AOB42-43; JA2839-40. Appellants and GAO also gave considerable attention to the PBCAs' role as "Intermediaries." JA2848-51.

In stark contrast, the COFC failed to give any serious consideration to the PBACC instrument, and ignored or dismissed the uncontroverted record in favor of

HUD's litigation-based arguments. *See* AOB32-46. The COFC essentially treated its finding that HUD has statutory authority to enter assistance agreements as a substitute for the required FGCAA analysis. AOB45-46. The COFC's consideration of the PBACC was limited to a superficial review of the common nomenclature in the PBACC and other types of "ACCs" that HUD uses in fundamentally different situations. JA0033-34. The COFC instead relied primarily on the Housing Act's broad preamble and policy language. JA0034.

Not surprisingly, HUD advocates the same misguided approach. It ducks the fundamental examination of the instrument required by the FGCAA. Instead, HUD argues that because the PBACC contains the term "annual contribution contract" (or "ACC") -- a label HUD uses for a variety of different instruments -- it is by definition an assistance agreement. GB6. HUD also substitutes the Housing Act's broad statutory preamble and policy pronouncements for any direct examination of the PBACC. GB28-35. These are diversions from the FGCAA-required analysis.

The PBACCs' terms clearly require the PBCA to provide administrative services to HUD in exchange for the successful provision of which HUD pays the PBCA an administrative fee. *See* AOB11-15. The extensive record confirms that HUD's principal purpose in obtaining the PBCA's services was to alleviate a substantial burden on HUD's staff and to improve HUD's fulfillment of its

oversight duties. AOB37-41. HUD cannot explain away its own controlling contemporaneous statements, nor does it even attempt to do so.

Most importantly, HUD's Brief belies a fatal flaw in the COFC's decision: its failure to consider that PBCA's are acting as **third party Intermediaries** and to apply the FGCAA accordingly. GAO properly considered this very question and concluded that the PBACCs constitute procurement contracts. JA300/AR2848-51.

1. The PBACCs Are Fundamentally Different than the "ACCs" HUD Identifies

The "Traditional ACCs" cited in HUD's Brief, at 19, 23, 47; *see also* JA0032-33, are fundamentally different from the PBACCs in question. This is clear from an examination of the very different terms and conditions presented by those instruments as well as through HUD's official documentation.

HUD asserts that it has a "39-year history" of using ACC contracts under Section 8, that all ACC contracts constitute assistance agreements, and therefore the PBACC must be an assistance agreement. *E.g.*, GB4. HUD argues that "[a]ll Section 8 programs are implemented through two contracts: the Annual Contributions Contract (ACC) and the Housing Assistance Payment (HAP) contract," GB6, and further suggests that it must use PHAs in order to provide assistance. GB17. HUD's argument is misleading.

HUD fails to acknowledge that it uses "ACCs" for a multitude of agreements which vary widely in their terms and purposes. ACCs take on substantially different functions and terms depending on their underlying program. An examination of the terms of these instruments and the extensive record discussing the PBACCs' unique attributes makes clear that the PBACC is fundamentally different than all other "ACCs," and that the COFC's and HUD's reliance on their common nomenclature is inappropriate and contrary to the FGCAA.

The Tenant-Based and Project-Based Section 8 programs are very different programs but both refer to contracts between HUD and PHAs as "ACCs." For example, under Tenant-Based ACCs, the PHA itself receives the assistance funding from HUD, selects the parties who are to receive assistance, and has the power to terminate that assistance. JA300/AR1931-34. The assistance is included in the Tenant-Based ACC contract and truly flows from (and is not merely processed through) the ACC. JA300/AR1932. The Tenant-Based assistance is inextricably wrapped into the Tenant-Based ACC. If the Tenant-Based ACC contract goes away, so does the assistance. *Id.*

In contrast, in the Project-Based program, HUD "has primary responsibility for contract administration but has assigned portions of these responsibilities to CAs [Contract Administrators]." JA300/AR1929 (emphasis added). Even within

the Project-Based program, the PBACC is also fundamentally different from the "Traditional ACCs" HUD uses in other aspects of the Project-Based program. JA300/AR1929. Under a Traditional ACC, HUD granted the PHA authority to select the project owner, and granted the PHA express authority to "carry out the Project," i.e., to "(a) enter into Agreements, (b) enter into a Contract, (c) make housing assistance payments on behalf of families, and (d) take all other necessary actions." JA300/AR1617(§1.2)(emphasis added). The term of the Traditional ACC was congruent with the overall term of the underlying assistance, i.e., up to 20 years. *Id.*

Virtually none of these attributes are present in PBACCs. When using a PBACC, HUD remains a party to the HAP contract and has direct responsibilities under it, including the primary obligation to provide the assistance. AOB12-14, AOB23-24. The PBACC's term is separately established with no relation to the HAP contract's term. AOB15. HUD, not the PHA, has already selected the property owners who participate in the program and no longer accepts applications for new projects. JA300/AR1825.

HUD's guidance embraces this important distinction:

> The use of PBCAs began as an initiative in 2000. Under a performance based ACC, the scope of responsibilities of a Contract Administrator is *more limited than* that of a Traditional Contract Administrator. A PBCA's responsibilities focus on the day-to-day monitoring and servicing of Section 8 HAP contracts. PBCAs are

> generally required to administer contracts on a statewide basis and have strict performance and reporting requirements outlined in their ACC.

JA300/AR1929 (emphasis added).

In addition, HUD retains not only primary responsibility, but all discretion and enforcement authority over the material aspects of the HAP contract. AOB11-14. For example, only HUD has the ability to withhold payments to, and to take any disciplinary or enforcement action against, the owner.[3] *Id.* In contrast, the PBCA's role is limited to monitoring, verifying and reporting to HUD. *Id.* HUD does not contest any of these facts. In May 2012, in formal comments it filed with HUD regarding a proposed tenant survey, HUD's ally, NCSHA, confirmed "the PBCA is contracted by HUD to monitor the property owner for compliance with HUD regulations, but it has no authority to fire the management or owner, or unilaterally administer any type of sanction or penalty. This is within HUD's scope of responsibility." JA300/AR2000.

[3] HUD gives only superficial treatment to how the HAP payments are made (GB42), omitting such facts as the owner must submit invoices to HUD's "TRACS" system, that only HUD can approve or stop HAP payments, that the HAP funds are deposited into a special bank account and do not become the PHA's funds, that interest earned in that account is controlled by HUD, and that the PBCA's role in the payment process is entirely ministerial. AOB13-14.

Given these acknowledged, substantial differences in the terms and conditions of PBACCs vs. other ACCs, HUD's suggestion that PBACCs represent a continuation of 39-years of established practice is untenable.[4]

Nevertheless, the COFC erroneously determined that under HUD's regulations the PHA had become "primarily responsible" for HAP contract administration. JA00033-34. HUD's official documents state that it remains primarily responsible for HAP contract administration. JA300/AR1929. The COFC failed to appropriately examine the PBACC instrument, opting instead to apply generic terms used elsewhere by HUD. In doing so, the COFC

[4] HUD makes various inaccurate or exaggerated statements about its compliance with certain laws over extended time periods. GB3, 4, 22. For example, HUD asserts that "[**s]ince 1937**, when HUD began entering into ACCs with PHAs, HUD has never utilized a CICA and FAR-compliant procurement contract." GB22n.9 (emphasis added). Notably, CICA is the Competition in Contracting Act **of 1984**, which became effective in 1985, *Frank Thatcher Associates*, B-228744, Nov. 12, 1987, 87-2 CPD ¶480, at 3; and the FAR did not become effective **until 1984**. *JANA, Inc. v. U.S.*, 936 F.2d 1265, 1268 (Fed. Cir. 1991). In fact, contrary to HUD's allegations, GB3, 4, and as ignored by HUD's Brief, Appellants explicitly stated that "[w]hile the 1999 [HUD] RFP did not include [FAR] clauses, the Federal Register notice publishing it stated that it would follow many FAR principles. JA300/AR428 ('This solicitation is not a formal procurement within the meaning of the [FAR] but will follow many of those principles.')." AOB9. Additionally, HUD's statement that, for 39 years its assistance agreements have complied with the Federal Grant and Cooperative Agreement Act **of 1977**, GB3-4, ignores the fact that the FGCAA was passed in 1978. *See* Pub.L.No. 95-224, 92 Stat. 3, 6 (Feb. 3, 1978).

fundamentally misstates the roles and obligations of HUD and the PHA under the PBACC and erred in its application of the FGCAA.

2. HUD's Contention that All Section 8 Programs Are Implemented Through Two Contracts, the ACCs and HAPs, Is Incorrect

Contrary to HUD's claim, GB41, the Project-Based program at issue here is not "implemented like all other programs under Housing Act." From 1974 to 1999, HUD entered into HAP contracts with project owners and directly administered those HAP contracts with its own employees, without using a PHA or an ACC. AOB7-8. HUD elected to outsource a portion of the administrative tasks for approximately 20,000 HAP contracts to PHAs through the 1999 RFP. AOB8-9. HUD does not contest the record evidence that the outsourcing was done for two reasons: to alleviate the substantial burden on HUD's staff and to assist HUD in improving program oversight. AOB37-41. Outside of litigation, HUD has consistently cited these purposes for the PBCA initiative. *Id.*

The legal obligation to provide housing assistance payments continues to be in the HAP contracts, to which HUD remains a party. AOB15-17. By HUD's admission, it must remain a party to the HAP contracts because they – not the PBACC contract -- represent the point of obligation of the funds. JA300/AR6107 (2007 HUD memo: "HUD MUST sign all HAP contract renewals"). While HUD outsourced limited aspects of HAP contract administration in 1999, it retained the

responsibility to provide the HAP to the project owner and admittedly remains primarily responsible for HAP contract administration. JA300/AR1929.

The Housing Act's plain language makes clear that Section 8 assistance takes the form of funding – there is no services component mandated by the Housing Act. JA300/AR300 (HUD 2013 Budget request: "Project-Based Rental Assistance (PBRA) program provides rental assistance funding to [project owners]"). Therefore, it is the HAP payment which constitutes the assistance under the Project-Based program and the legal obligation to provide this assistance is HUD's via the HAP contract, not the PBACC. AOB15-17 *see also* JA300/AR1825(the "assistance is paid by HUD to the owner of an assisted unit on behalf of an eligible [low-income] family.")

In contrast, the PBACC contract, the instrument in question, does not provide federal assistance. It merely requires the PBCA to provide services to HUD – supporting HUD's oversight and administration function – in exchange for an administrative fee. AOB11-15. Put another way, the services the PBCA provides HUD are not the federal assistance called for under the Section 8 program, the HAP payments are.[5]

[5] Fees in excess of the PBCA's costs are not a separate "thing of value" (GB48-50), rather they are simply profit. JA300/AR0467-70 ("[M]any PBCAs had profits in excess of the amount originally determined to be acceptable to HUD.").

Neither the Housing Act, nor the PBACCs call for a "service" to be provided to the Program's beneficiaries: the "assistance is paid by HUD to the owner of an assisted unit on behalf of an eligible [low-income] family." JA300/AR1825. As NCSHA admits, "most Section 8 tenants have little or no exposure to the PBCA." JA300/AR2000 (also noting that "customer satisfaction" is not one of the PBACC's performance-based tasks). NCSHA further concedes: "The property owner and manager have significant responsibility for tenant satisfaction, not the PBCA." JA300/AR2002.

The PBACC contract is distinct from other ACCs and was developed specifically to facilitate HUD's 1999 outsourcing effort. It is decidedly NOT a "reiteration" of 39 years of HUD using ACCs, nor is a PBACC required for HUD to discharge its Housing Act assistance obligations. HUD's arguments that all ACCs should be treated the same and as a proxy for the unique PBACC contract is incorrect and inconsistent with the FGCAA's requirements. The COFC relied on this argument and erred because it failed to consider the instrument in question, the PBACC, to determine its principal purpose.

3. The Threshold Question of Identifying Statutory Authority to Enter a Cooperative Agreement Does Not Answer the FGCAA's Questions

The COFC focused on whether HUD had the authority to enter into a cooperative agreement. However, this is a threshold issue and a finding of such

authority does not reach the dispositive question here, i.e., the principal purpose of the PBACC under the FGCAA. (It is true that without such authority an agency cannot use an assistance agreement.) Even where such authority exists, "the specific transaction must be reviewed and properly classified since some aspects of carrying out an assistance program remain primarily procurement in nature." *Interpretation of Federal Grant & Cooperative Agreement Act of 1977*, 1980 U.S. Comp. Gen. LEXIS 3894, at *14-*15; *360Training*, 104 Fed Cl. at 587-88.

From 1974-1999, HUD entered the vast majority of HAP contracts now covered by PBACCs pursuant to then-section (b)(2) of the Housing Act, which provided for Substantial Rehabilitation/New Construction ("SR/NC") projects. Housing and Community Development Act of 1974, P.L.No. 93-383, § 201(a), 88 Stat. 633, 662-63 (1974). These SR/NC projects and HUD's role in them differed substantially from other Section 8 projects because HUD often had significant ties to the project, such as providing HUD-insured loans. AOB6-7.

HUD argued, both at GAO and the COFC, that after Congress repealed section (b)(2) in 1983, the only remaining authority to provide assistance was section (b)(1), which applied only to "existing" housing. GB35; 42 U.S.C. §1437f(b)(1). Section (b)(1) states that HUD may not directly administer assistance unless it determines that no PHA has been organized in the area or no PHA is able to perform. *Id.* HUD contended (b)(1) required it to enter into an

assistance agreement with PHAs, which in turn enter into contracts with project owners. *Id.* (As discussed below, (b)(2) did not contain language limiting HUD to using PHAs and hence HUD was not charged with delivering assistance payments through a PHA for the SR/NC program. 88 Stat. 662-63.)

Both GAO and the COFC rejected HUD's argument. The COFC found: (i) HUD was not using (b)(1) because that section applies to the "existing housing" portion of the Project-Based Program, JA0022-24, and (ii) the projects at issue were covered under former section (b)(2) which covered the SR/NC portion of the program. JA0026. The COFC held that section (b)(2) allowed HUD to enter into: (1) HAP contracts directly with project owners ("Sentence (1)"), or (2) ACCs with PHAs, which in turn would enter into a HAP contract with the owner ("Sentence (2)"). JA0030. The COFC acknowledged that the approximately 20,000 HAP contracts in question were entered into directly between HUD and the project owner between 1974 and 1999 under the Sentence (1) option. *Id.*

Despite Section (b)(2)'s 1983 repeal, the COFC found that through the PBCA initiative starting in 1999, HUD was actually converting all those projects from Sentence (1) to Sentence (2) projects, and that its use of PBCAs was

indicative of a cooperative agreement.[6] JA0031-32. The COFC's logic and conclusion are fatally flawed.

a. Even if HUD Had Authority to Enter an Assistance Agreement, the PBCA Initiative Did Not Create an Assistance Relationship

Assuming arguendo that the COFC's threshold ruling of statutory authority to use an assistance agreement was correct, it is not dispositive. The FGCAA requirements must still be properly applied to the PBACC, which the COFC failed to do.[7]

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[6] The COFC erroneously found that HUD, the owners and the PBCAs were engaged in "conversion" from one type of project to another, pursuant to HUD's regulations. JA0031-32. Putting aside the 1983 repeal of the statutory authority for this process, there is nothing in the record suggesting that anyone thought they were engaging in a "conversion" of the 20,000 contracts covered by the PBCA initiative. There no record reference to the conversion regulation, 24 C.F.R. §880.505(c) relevant to the PBCA initiative.

[7] Because, as the COFC stated, the statutory provisions are a "morass" (JA0003) and the issue is not dispositive to the ultimate question before this Court, Appellants are not requesting review of the COFC's ruling that HUD had statutory authority to enter a cooperative agreement. HUD argues that by not appealing this issue, Appellants are conceding their case. GB26. However, this merely reaffirms that HUD is erroneously treating the threshold question as resolving the analysis required by the FGCAA. HUD makes similar distortions of Appellants' positions, including erroneously suggesting: that Appellants agreed that ACCs under (b)(1) are cooperative agreements, and because (b)(1) and (b)(2) contain identical language (b)(2) authorizes assistance agreements (GB36); that HUD "transferred responsibility of HAP administration to PHAs (GB40); and every Appellant "alleged that HUD could legally limit competition…." GB51.

Even assuming HUD had the authority to create a new Sentence (2) arrangement to replace the 20,000 existing HAP contracts, that is not what the PBCA initiative does. HUD remains a party to the HAP contracts, has the primary obligation under them (to provide the assistance), and by its own admission HUD remains primarily responsible for HAP contract administration. *Supra* 17-18. In addition, the HAP Renewal Contract simply "renew[s]" the expiring HAP contract between the owner and the original Contract Administrator (i.e., HUD) for an "additional term" and renews "all provisions" of the original HAP contract unless specifically modified by the Renewal Contract. JA300/AR2270. HUD is simply continuing the Sentence (1) approach through the PBCA initiative.

HUD presents this Court with a false choice by suggesting it has only two options: administer the HAP contracts itself or assign them completely to PHAs pursuant to an ACC. GB39. Pursuant to its inherent authority to enter procurement contracts, *supra* 10, HUD has a third option: to remain responsible for the HAP but to use its inherent procurement authority to outsource a portion of its functions, which is precisely what the PBCA initiative did.

That the PBACC contracts are fundamentally different than the Traditional ACC contracts HUD used when engaging in true Sentence (2) arrangements confirms HUD is still using a Sentence (1) approach. *Supra* 14. Putting aside whether HUD is authorized to convert a project to a Sentence (2) approach, that is

what the PBCA initiative does. HUD remains in a direct contractual relationship with the project owner through the HAP contract and these remain Sentence (1) projects.

This, taken together with the PBACCs' purpose to alleviate the burden on HUD's staff and improve HUD's oversight, makes it clear the PBACCs are procurement contracts.

b. MAHRA Extended HUD's Obligation to Renew HAP Contracts and Does Not Mandate or Even Suggest an Assistance Agreement with a PHA Be Used

The COFC's and HUD's reliance on the Multifamily Assisted Housing Reform and Affordability Act, Pub.L.No. 105-65, Title V, §510 *et seq.,* 42 U.S.C. §1437f note ("MAHRA"), to suggest PBACCs are cooperative agreements is misplaced. There is no dispute that MAHRA provided HUD with explicit authority to renew HAP contracts and payments, which HUD had lacked since the 1983 repeal of the SR/NC authorization set forth in Section (b)(2). MAHRA §524. However, MAHRA did <u>not</u> require HUD to use ACCs with PHAs to enter into HAP contracts or to provide the housing assistance payments, as HUD's brief suggests. In fact, MAHRA's HAP Renewal provision (§524) makes no reference to PHAs or ACCs. Instead, §524, as amended in 1999, unequivocally places the obligation on HUD to provide the assistance to project owners:

> The Secretary shall, at the request of the owner of the project…use amounts available for renewal assistance under Section 8 of such Act to provide such assistance for the project. The assistance shall be provided under a contract having such terms and conditions as the Secretary considers appropriate, subject to the requirements of this section.

Recognizing that Section 8 "assistance" is the housing assistance payment, MAHRA's Renewal provision merely reaffirms HUD's responsibility for providing the SR/NC Project-Based program assistance, as it has since 1974.

MAHRA was comprehensive legislation with several operative provisions addressing HAP renewals and other programs. What Congress did and did not say concerning cooperative agreements in MAHRA is telling. With respect to a separate program authorized by MAHRA, the Mark-to-Market Program, Congress directed HUD to enter into "cooperative agreements." MAHRA §513(a)(2).

However, in MAHRA §524, which provides HUD HAP renewal authority, Congress made no mention of cooperative agreements, nor did it reference using PHAs or ACCs. Rather §524 places the obligation on the Secretary "to provide such assistance" to the project.[8] In enacting MAHRA, Congress was mindful of the FGCAA. *E.g.*, *Hall v. U.S.*, 132 S.Ct. 1882, 1889 (2012)("We assume that Congress is aware of existing law when it passes legislation"). Had Congress

[8] The Secretary has no discretion as to whether to grant such a request and provide assistance, and must provide such assistance unless certain exceptions are met. (MAHRA §524(a)(2), citing §516).

intended HUD to enter into cooperative agreements to implement the renewal of Project-Based assistance, it would have said so, as it did in the Mark-to-Market program.

c. The COFC's and HUD's Reliance on MAHRA's "Findings" Is Erroneous

Despite MAHRA §524's silence as to cooperative agreements or PHAs, the COFC looked to the broad policy statements in MAHRA's "Findings," §511(11)(C). JA0011. The COFC reasoned that, when read in conjunction with the broad policy language in the Housing Act's preamble, these Findings suggested that Congress intended for the states to have a primary role in implementing the Section 8 program. JA0345. Accordingly, the COFC concluded that the PBACCs must be cooperative agreements.

Section 511(11)(C), however, merely suggests that HUD might transfer responsibility to "state, local and other entities."[9] It is not an operative section, and it makes no mention of ACCs, PHAs, or the use of cooperative agreements. *Ass'n of Am. R.Rs. v. Costle,* 562 F.2d 1310, 1316 (D.C. Cir. 1977)(preamble "is not an operative part of the statute"); *see Atlantic Richfield Co. v. U.S.*, 764 F.2d 837, 840 (Fed. Cir. 1985)("where the enacting or operative parts of a statute are

[9] The COFC does not reconcile the inclusion of "other entities" with its conclusion that MAHRA created a narrow mandate for giving "states" the primary role in implementing the Housing Act.

unambiguous, the meaning of the statute cannot be controlled by language in the preamble"). In addition, all sections of MAHRA (including §511) except §524, will expire on October 1, 2015, further demonstrating that §511 cannot be imputed to the renewal of HAP contracts. MAHRA §579 (as amended by Consolidated and Further Continuing Appropriations Act, 2012, Sec. 237; Pub.L.No. 112-55, 125 Stat. 552, 702).

Furthermore, the COFC and HUD ignore the very next sentence of MAHRA §511, which states:

> (12) the authority and duties of the Secretary … may be delegated to State, local or other entities at the discretion of the Secretary … so the Secretary has the discretion to be relieved of processing and approving any document or action required by these reforms.

As discussed, the §524 Renewal Provisions place an obligation and duty on the Secretary to provide housing assistance payments to owners with SR/NC HAP contracts. Under §511(12), the Secretary may "delegate" certain MAHRA-required actions, to "relieve" the Secretary of "processing and approving" documents and actions. This "discretion" to delegate makes clear that (i) HUD retained responsibility for making the assistance payments; and (ii) the purpose in any delegation of administration was to relieve a burden on HUD. Read together with the contemporaneous record statements, the PBACCs' purpose is inescapable: to relieve HUD staff of duties they were otherwise required to perform.

In enacting MAHRA §524, Congress intended to address the 1983 expiration of the SR/NC program and provide HUD with renewal authority for existing HAP contracts. However, MAHRA §524 did not make any reference to PHAs, ACCs or cooperative agreements. The COFC's conclusion that MAHRA somehow resuscitated Section (b)(2) and re-created authority to use assistance agreements is dubious; to suggest that MAHRA required HUD to use cooperative agreements with PHAs to administer the program is untenable.

4. HUD's Insistence that (b)(1) Applies, Belies a Material Flaw in the COFC's Decision, the Failure to Consider The PBCAs as Intermediaries

HUD continues to invoke Section (b)(1) to suggest it is required to administer the Section 8 Program through ACCs with PHAs. Neither the law nor the record support HUD's position and both GAO and the COFC rejected HUD's argument.

HUD presents the following syllogism to describe the PBCA initiative: in 1997, Congress enacted MAHRA giving HUD long-term authority to renew expiring HAP contracts; however, HUD was precluded from administering HAP contracts unless there was no PHA available or competent (invoking (b)(1)); and "accordingly … HUD initiated [the 1999] nationwide competition to award an ACC in each [state]." GB17. This argument is untethered to the law and administrative record, and was rejected by the COFC and GAO. JA0022-24;

JA300/AR2848. Nevertheless, this argument is necessary to cover a material hole in the COFC's decision: the failure to properly consider the law regarding "Intermediaries" and their treatment under the FGCAA.

GAO correctly identified the PBACCs as presenting an intermediary situation. JA300/AR2848-51; AOB41-46, 49-50. GAO concluded that the PBACC is merely a "conduit" through which the assistance payment flows to the statutory beneficiary, JA300/AR2850-51, which does not make the instrument between HUD and the PHA an assistance agreement. Despite the substantial discussion of the intermediary concept by GAO in its decision, in GAO's Redbook and by the COFC in *360Training*, the COFC gave no consideration to the intermediary issue and the FGCAA ramifications. As noted in *360Training*:

> if an agency uses an intermediary to provide a service that the agency is required to provide to beneficiaries, then the services are for the agency's benefit.

104 Fed. Cl. at 580.

The statute in 360Training required the agency to provide training services. *Id*. at 578 ("OSHA is required to "establish[] and supervis[e]" programs for the education and training of workers. 29 U.S.C. § 670(c) (2006).") While the assistance here is funding -- not services, as HUD admits -- MAHRA requires HUD to provide the funds to the project owner. GB 41; MAHRA§524. The HAP is the program assistance and HUD is responsible for providing it. Moreover,

HUD admits that it is primarily responsible for HAP contract administration. JA300/AR1929. Since the program assistance is funding HUD provides to project owners to subsidize low-income tenants, (JA300/AR1825), and does not involve services, the services provided by the PHA can only be for HUD's benefit.

In contrast, this is not an intermediary-receiving-assistance scenario. *360Training* states that "an agency is obtaining services for a public purpose if the agency is charged with providing support or assistance to intermediaries as opposed to the final beneficiaries." 104 Fed. Cl. at 580 (citing Redbook, vol. II, ch. 10). Significantly, there is nothing in Section (b)(2) of the Housing Act or MAHRA that charges HUD with providing support or assistance to PHAs as intermediaries. Recognizing this, HUD is compelled to re-introduce its "(b)(1) argument" to establish it is <u>required</u> to use PHAs as a conduit. As GAO and the COFC correctly concluded, (b)(1) and its corresponding mandate to use an ACC with a PHA is not applicable here. Section (b)(2) did not contain such a mandate because it lacks the language set forth in (b)(1) creating a mandate to use ACCs. Therefore, neither Section (b)(2) nor MAHRA charges HUD with providing support to intermediaries as opposed to the final beneficiaries. Consequently, the intermediary analysis dictates that the PBACCs represent procurement instruments.

II. CONCLUSION

For the reasons stated herein and in their Opening Brief, Appellants respectfully request that the judgment of the Court of Federal Claims be reversed or vacated.

August 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 8th day of August, the corrected copy of Plaintiffs-Appellants' Opening Brief was served upon all parties via the Court's electronic filing system.

/S/ Elizabeth M. Gill
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CERTIFICATE OF COMPLIANCE

I certify that the foregoing corrected copy of PLAINTIFFS-APPELLANTS' REPLY BRIEF complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This BRIEF contains 6,989 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), as measured by the word processing software used to prepare this BRIEF.

August 8, 2013

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